United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7022

To be argued by
ARTHUR IAN MILTZ

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket #75-7022 Calendar #821

JOHN H. MARCHESE,
Plaintiff-Appellant,

against

MOORE-McCORMACK LINES, INC.,
Defendant and Third-Party Plaintiff-Appellee,

against

COURT CARPENTRY & MARINE CONTRACTOR CO., INC.,
Third-Party Defendant-Appellee.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE MOORE-McCORMACK LINES, INC.

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DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE MOORE McCORMACK LINES, INC.'s BRIEF ON APPEAL

Statement

This action was commenced by the plaintiff, a lasher/carpenter, against defendant and third-party plaintiff-appellee Moore-McCormack Lines, Inc. for injuries allegedly sustained while working aboard the SS "MORMACGLEN" on August 17, 1970. Moore-McCormack Lines, Inc. impleaded third-party defendant-appellee Court Carpentry & Marine Contractor Co., Inc., plaintiff's employer, and Universal Terminal & Stevedoring Corp., the stevedoring contractor, seeking indemnity (iii-iv).

By written stipulation of all of the parties, this matter was referred to Honorable Vincent A. Catoggio, United States Magistrate, to hear the testimony and report his findings and conclusions to the Court in accordance with

the provisions of Rule 53 of the Federal Rules of Civil Procedure (iii-iv, 3a). It was further agreed that the question of liability alone should be presented for determination by Magistrate Catoggio (iv, 5a-6a). All claims against third-party defendant Universal Terminal & Stevedoring Corp. were discontinued, also by stipulation, at the outset (v, xii, 3a-5a).

Subsequent to the taking of the testimony, Magistrate Catoggio submitted his report to the Court on September 24, 1970, in substance dismissing the complaint as to Moore-McCormack Lines, Inc. and also concluding that the third-party complaint against Court Carpentry & Marine Contractor Co., Inc. should be dismissed (iii-xiii).

The plaintiff filed objections to the Master's report. Moore-McCormack Lines, Inc. and Court Carpentry & Marine Contractor Co., Inc. moved to confirm it; the plaintiff cross-moved to modify and reject it (ii). On October 18, 1974 Judge Anthony J. Travia granted the motions of Moore-McCormack Lines, Inc. and Court Carpentry & Marine Contractor Co., Inc. (ii). On November 6, 1974 Judge Travia entered an order which dismissed the plaintiff's and defendant and third-party plaintiff's complaints (xiv-xv). On November 7, 1974 judgment was entered in accordance with Judge Travia's order (xvi). Plaintiff appeals from that judgment and from the order upon which it was based (xvii).

Facts

On August 17, 1970 the SS "MORMACGLEN", a vessel owned by the defendant and third-party plaintiff-appellee Moore-McCormack Lines, Inc., was docked at the 23rd Street Terminal in Brooklyn to discharge cargo (12a-13a). The specific cargo which is the subject of the present action was loaded aboard the vessel in Brazil (iv-vi, 137a) and consisted of four pipes measuring 15 to 20 feet long (17a, 86a) by 3 to 4½ feet in diameter (17a, 93a) which had been stowed on the main deck of the vessel on the inshore side

of the No. 5 hatch (14a, 16a-17a). The pipes had been stowed in such a fashion that three of them rested on wooden sleepers running athwartship with the fourth placed atop the two pipes nearest the coaming and resting between those two pipes (14a-15a, 17a, 70a-71a, 83a, 108a). A photograph placed in evidence by the plaintiff and marked Exhibit "1" demonstrates the manner in which the pipes were originally stowed (14a-15a). A space of approximately 1 to 1½ feet existed between the hatch coaming and the pipes on the one side and the pipes and the ship's rail on the other side, the pipes having been stowed so that the spaces existed on either side (16a, 55a).

The pipes were secured by three wire lashings, each one running over the pipes from the railing to the coaming. One lashing had been placed across the center of the pipes and the other two lashings ran in the same direction approximately 3 feet from either end (17a, 23a-24a, 63a-65a, 69a-70a).

Each of the three lashings was secured to the deck on the rail side (18a-19a, 25a-27a, 69a) with an 18 inch turnbuckle attached to a pad-eye. The end of each lashing wire, which passed through the eye at the other end of the turnbuckle, was clamped with two clips, each of which was held by two 6 to 8 inch screws with nuts (28a, 52a-55a, 69a-70a, 94a-95a, 110a-111a, 112a-113a, 121a-122a). There was no slack in any of the three wires (70a-71a).

This specific cargo of pipes was firmly secured and, up to the time the plaintiff and his partner began to work on them, remained secure and properly lashed (71a, 91a).

The plaintiff and his work partner, employees of the third-party defendant-appellee Court Carpentry & Marine Contractor Co., Inc., reported for work aboard the SS "Mormacglen" at 8:00 a.m. (12a). This plaintiff, Mr. Marchese, was directed by his snapper at about 9:00 a.m. to unlash the pipes previously described (14a-16a).

The plaintiff, a lasher and marine carpenter with several years of experience (20a-21a), commenced unlashing the pipes by loosening the screws in the wire clips and after removing the forward and middle lashing wires, and while working on the clip from the third and final wire, caused the pipe which was resting atop the other three pipes to force its way between the pipes beneath it, forcing one pipe against the ship's railing where the plaintiff was standing while working (17a-19a, 25a-29a, 33a, 65a-74a, 84a-89a, 96a-102a).

Why the plaintiff chose to release the clips and thereby cause instant pressure and precipitous movement rather than to use the safe and gradual method of loosening the turnbuckles is not reasonably explained, though it does in fact render an explanation for the cause of the accident. It is respectfully submitted that plaintiff's belated and self contradicted (49a-52a) contention that his snapper's order to work quickly was tantamount to an instruction to proceed dangerously and to sacrifice safety for speed (16a, 18a, 31a-33a, 54a-56a) is patently absurd and is certainly not deserving of credulity, which is apparently what the Master also believed. In fact, plaintiff's own expert testified that release by turnbuckle would have allowed gradual, safe movement (157a), with which the plaintiff himself agreed (55a).

The method used by the plaintiff was his own and, therefore, the cause of the accident must be attributed to him only. Mr. Marchese does in fact testify that the proper way to unlash this cargo would have been to unloosen the turnbuckles (32a, 52a-56a), but that because he had been told to do the job quickly by his snapper (16a, 31a-33a, 54a-56a), he did it in the method described, which he perceived to be a faster method, although, unquestionably, it led to his accident. It should be noted that even the plaintiff's contentions regarding the order to proceed quickly are lately arisen, since no mention of them was made during the plaintiff's examination before trial, although the area of orders given was explored in detail (49a-52a).

This plaintiff, in defense of his own action, and although he admitted to several years of experience aboard vessels (20a-21a, 46a-48a), had the temerity to testify that he was not aware that a ship's weather deck slants toward the rail (37a-38a, 46a-48a).

Is it reasonable to assume that an experienced lasher would not be aware of the inevitable movement of these pipes toward the railing when their lashings were released? In fact, the plaintiff himself testified upon cross-examination to facts clearly indicating that he knew or should have known of the slant of the deck (37a-38a, 47a-48a).

In this vein, is it reasonable to assume that a man of experience would stand between the pipes and the railing, the inevitable path of the free pipes? Certainly this is an act of negligence which can be attributed only to the plaintiff himself; the plaintiff's co-worker, Mr. Anderson, testified to facts making clear that there was no reason at all for the plaintiff to have been standing where he was at the time (104a-105a).

Of utmost importance in determining where responsibility for this accident must lie is the fact that the plaintiff himself testified that he did not know whether or not the pipes were chocked before he began to unlash them, and that he never took the trouble to determine whether or not they were chocked (24a, 37a, 61a-62a, 78a-79a).

It is suggested that this act alone by the plaintiff was sufficient to charge him with 100 percent contributory negligence, since it would only have taken a few seconds to look beneath the pipes to determine whether or not they were chocked, as the plaintiff himself testified he could have done (56a-57a).

Even assuming that they were chocked, it would have been a reasonable action by the plaintiff to check the chocking before unlashing in order to be certain that the chocking was secure. A reasonable and prudent man would have done so.

In this regard, the plaintiff's expert, Mr. Martino, testified th[illegible] would be Mr. Marchese's responsibility to determine [illegible] the cargo was chocked (143a-144a) and that Mr. Marchese should have looked to see if it was (144a). Mr. Martino stated that he himself would have looked to see if the cargo was chocked (144a, 153a) and he would consider it safe and prudent to look for chocking (153a-154a).

This testimony by Mr. Martino, it must be remembered, came from the witness whom the plaintiff himself called to testify on his behalf and presumably in his favor. Even Mr. Martino could not condone the actions of the plaintiff.

Mr. Anderson, the plaintiff's work partner, also testified that if he knew the pipes were not chocked, he would not have released the lashing wire (119a).

There is no testimony to suggest that the pipes should have been chocked, since upon the arrival of the vessel the cargo was staunch. Indeed, the plaintiff himself testified that round cargo is sometimes secured without chocks (59a-61a). The facts do, however, suggest that the unlashing should have been done by a method not calculated to cause the pipes to be forced toward the railing. That method would have been t[illegible] unscrew the turnbuckles and allow the pipes to settle slo[illegible]ly while the lashing wires kept them secured (55a, 157a), which both the plaintiff and his own expert Mr. Martino testified would have occurred if the work had been done that way (55a, 157a).

In final despair, Mr. Marchese, who originally testified that he was working alone (40a-41a) now contends that his work partner, Mr. Anderson, caused the pipes to roll by removing the clip on the coaming side (94a-97a, 161a). If this is true, then we are concerned here with a negligent act of a fellow employee which would not render the vessel unseaworthy and, therefore, required a dismissal of the plaintiff's complaint.

POINT I

Rule 53 of the Federal Rules of Civil Procedure provides for the acceptance of the Master's findings of fact unless clearly erroneous.

Rule 53 (e) (2) of the Federal Rules of Civil Procedure with respect to a reference to a Master in non-jury actions provides that ". . . the Court shall accept the Master's findings of fact unless clearly erroneous." The cases which confirm this clearly erroneous doctrine with respect to the findings of fact made by a Master are numerous and have been affirmed in every Circuit where the question has arisen. In re *Vernon Hills, Inc.*, 348 F.2d 4; in re *Eck*, 58 F. Supp. 598 (D.C.N.Y. 1944); in re *Tumen*, 58 F. Supp. 210 (D.C.N.J. 1944), aff. 146 F.2d 268; *Massachusetts Mutual Life Insurance Co.* v. *Murphy*, 45 F. Supp. 826 (D.C. Mass. 1942), aff. 137 F.2d 154, cert. den. 64 S.Ct. 261.

Of course, the clearly erroneous doctrine applies to appeals as well, and to maritime appeals in particular. *Castro* v. *Moore-McCormack Lines, Inc.*, 325 F.2d 72 (CCA 2, 1963); *McAllister* v. *United States*, 348 U.S. 19. Accordingly, just as the Trial Court properly accepted the Master's findings, since they were not clearly erroneous, it is respectfully submitted that this Court should also leave them undisturbed.

It is submitted that the findings of Magistrate Catoggio to the effect that the plaintiff's reckless disregard for his own safety, the manner in which he did his work and the place where he positioned himself were the sole causes of his injury are far from clearly erroneous and, in fact, represent a reasonable conclusion as drawn from the testimony of the witnesses.

The burden of upsetting the Master's findings is clearly upon the plaintiff and no argument or recitation of facts

made have presented any logical basis for findings contrary to those of the Master.

At most, the plaintiff's attorney indicates that contrary findings might have been made; however, both parties are obliged to accept the findings as made unless it can be demonstrated that they were, in fact, clearly erroneous. We can see no demonstration of a breach of the clearly erroneous doctrine and, therefore, submit that the findings of Magistrate Catoggio should be accepted in toto.

POINT II

An injury caused exclusively by the plaintiff's own negligence, as was found to be the case here, must defeat his claim for recovery.

Within the framework of the facts of this case it was amply demonstrated at trial that the plaintiff's conduct and complete disregard for safe working procedures was the underlying cause of his accident. Magistrate Catoggio made that finding and in effect confirmed the rule laid down in *Donovan* v. *Esso Shipping Company*, 1958 AMC 2096, to the effect that an injury caused exclusively by the plaintiff's negligence cannot result in recovery of damages to him. Certainly, if this rule has any significance whatsoever, it is within the framework of the facts as established in this case that it must be applied. That the plaintiff's own negligence in the manner in which he went about his work was clearly the underlying cause of his accident is abundantly supported by the evidence.

POINT III

The defendant and third-party plaintiff-appellee was guilty of no negligence, nor did it breach its warranty of seaworthiness.

The plaintiff's complaint alleges a cause of action in negligence and unseaworthiness. In order to prevail herein he must establish by a preponderance of the credible

evidence that the third-party plaintiff was guilty of negligence or unseaworthiness which was the proximate cause of his injury. *Brady* v. *Southern Railroad Co.*, 320 U.S. 476. Further, the mere happening of an accident does not establish a prima facie case of unseaworthiness. *Paccione* v. *American Export Lines, Inc.*, 1972 AMC 2241; *Esso Standard Oil S.A.* v. *SS Gasbrag Sul*, 387 F.2d 573.

A review of the facts, as elicited through the testimony of the various witnesses during the trial, does not indicate any basis for a claim of negligence, since the cargo was staunch when the plaintiff began his work and the lashing operation was strictly within the control of the plaintiff and his co-workers. Therefore, if Mr. Marchese is to support his burden he must do so within his claim of unseaworthiness.

Insofar as unseaworthiness is concerned, it is submitted that where a safe method of operation exists and a lasher chooses an unsafe method of carrying out his work, the vessel owner may not be charged with liability for unseaworthiness. *Boker* v. *SS Christobal*, 488 F.2d 331.

In the instant case the plaintiff, an experienced lasher, chose to unlash the cargo of pipes by unscrewing the clips instead of using the safe method of unscrewing the turnbuckles, chose to stand in an unsafe place and chose not to look to see if chocks were in place before unlashing. These actions of the plaintiff, and these alone, created the situation which led to his injury. Under these circumstances, the vessel cannot be said to have been unseaworthy. Magistrate Catoggio in his findings confirms the actions of the plaintiff and therefore concludes that the vessel was not unseaworthy.

The only other basis for a claim of unseaworthiness would be a claim by the plaintiff that his work partner, Mr. Anderson, was guilty of negligence which resulted in an unseaworthy condition, thereby causing his accident. However, such an allegation would fall within the rule laid

down in *Usner* v. *Luckenbach Overseas Corp.*, 40 U.S. 494, 91 Sup.Ct. 514, to the effect that a vessel is not rendered unseaworthy by the single act of a third party which is a wholly unforeseeable act of negligence. *Robinson* v. *MV Mar Trader*, 477 F.2d 1331; *Tarabacchia* v. *Zim Israel Navigation Co., Ltd.*, 446 F.2d 1375.

Applying these well-accepted rules of Maritime Law to the facts of this case, it is an inescapable conclusion that the SS "MORMACGLEN", and particularly its properly stowed cargo, was seaworthy in all respects and, further, that any claims based upon unseaworthiness must fail.

CONCLUSION

It is respectfully submitted that the findings submitted to the Court by Magistrate Catoggio are clearly within the purview of reasonableness and are, therefore, not clearly erroneous and should be accepted by this Court. The credible evidence elicited through the plaintiff, his witness Mr. Anderson and his expert Mr. Martino inevitably guided the Court to the conclusion that the plaintiff's injuries were sustained as a result of his own negligence or that of his fellow worker Anderson and, therefore, his claim had to fail and his complaint be dismissed.

Respectfully submitted,

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